

BEFORE THE HEARINGS DIVISION
OFFICE OF HEARINGS & APPEALS
UNITED STATES DEPARTMENT OF THE INTERIOR
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

GENWAL COAL COMPANY, INC.,)	NOTICE OF VIOLATION
)	NO. 91-02-244-003
Petitioner,)	CRANDALL CANYON MINE,
)	EMERY COUNTY, UTAH
v.)	
)	COAL MINING PERMIT
OFFICE OF SURFACE MINING)	NO. ACT/015/032
RECLAMATION & ENFORCEMENT)	

PETITION FOR REVIEW AND REQUEST FOR HEARING

Pursuant to 43 C.F.R. Part 4.1100, et seq. and 30 C.F.R. § 843.16, Genwal Coal Company, Inc. (referred to as "Genwal" or "Petitioner") petitions for review of the fact of violation of Notice of Violation No. 91-02-244-003 issued to Petitioner on June 26, 1991, and requests a hearing on this matter in Salt Lake City, Utah.

STATEMENT OF FACTS

1. The Utah Division of Oil, Gas & Mining ("State" or "DOGM") issued Crandall Canyon Mine Permit No. ACT/015/032 to Petitioner on June 14, 1989.

2. On June 26, 1991, Notice of Violation No. 91-02-244-002 ("NOV") was issued by the federal Office of Surface

Mining Reclamation and Enforcement ("OSM") to Genwal as permittee of the Crandall Canyon Mine, Emery County, Utah (the "Mine.") A true and correct copy of the NOV is attached hereto as Exhibit "A."

3. The NOV was issued by OSM for Petitioner's alleged "failure to first obtain a permit from the Division (DOGM) prior to engaging in and carrying out any coal mining and reclamation operations." This NOV applies to a portion of the Crandall Canyon Mine Forest Development Road 50248 ("Forest Road 50248") extending from the present permit boundary approximately 1.3 miles to State Highway 31.

4. The NOV requires the operator to reclaim Forest Road 50248 within eighty (80) days or submit to DOGM a complete and adequate plan to permit and bond Forest Road 50248 within thirty (30) days of issuance of the NOV.

5. Prior to issuing the NOV, OSM issued ten day notice No. 91-02-246-002 ("TDN") to the State, dated March 21, 1991 for two violations including: (1) Petitioner's alleged "failure to obtain a permit from the Utah - DOGM prior to engaging in and carrying out any coal mining and reclamation operations" on Forest Road 50248 in violation of Utah Administrative Code 614-300-112.400, and (2) Petitioner's alleged "failure to prevent, to the extent possible, additional contributions of sediment to streamflow" at the bridge over Huntington Creek on Forest Road 50248. A true and correct copy of the TDN is attached as Exhibit "B."

6. In response to the TDN, DOGM declined to require the Petitioner to include Forest Road 50248 in the Crandall Canyon permit on the basis that: (1) the subject road is regulated by the Manti-LaSal National Forest ("Forest") and the Forest had been requested to respond to proposed State criteria for public roads to enable the State to make a public road determination; (2) the State could not make a public road determination until OSM approved the State's pending public road regulations; and (3) the State had not made a determination as to whether Forest Road 50248 bridge allegedly causing contributions to streamflow was subject to DOGM's jurisdiction. Letter to Robert H. Hagen, OSM Albuquerque Field Office, dated March 27, 1991, a true and correct copy of which is attached hereto as Exhibit "C."

7. Effective February 25, 1991, the Board of Oil, Gas and Mining adopted emergency rules defining "public road" as follows:

Public road means a road, (a) which has been designated as a public road pursuant to the laws of the jurisdiction which it is located, (b) which is maintained with public funds in a manner similar to other public roads of the same classification within the jurisdiction, and (c) which meets road construction standards for other public roads of the same classification in the local jurisdiction.

A true and correct copy of the Board Order dated February 25, 1991 is attached hereto as Exhibit "D."

8. Although these rules were submitted by DOGM to OSM by letter dated March 1, 1991, they were not approved as a Utah

State Program Amendment when the TDN was issued on March 21, 1991. March 27, 1991 letter, attached hereto as Exhibit "C," and the March 1, 1991 letter, a true and correct copy of which is attached hereto as Exhibit "D-1."

9. By letter dated March 22, 1991, the State requested Petitioner to secure a letter from the U.S. Forest Service concerning the public road status of Forest Road 50248. A true and correct copy of the March 22, 1991 letter is attached hereto as Exhibit "E."

10. By letter dated May 29, 1991, the Forest Road 50248 is a forest development road under the jurisdiction of the Manti-LaSal National Forest. A true and correct copy of the letter dated May 29, 1991 is attached hereto as Exhibit "F."

11. The State of Utah appealed OSM's TDN to W. Hord Tipton, OSM Deputy Director, by letter dated April 29, 1991. A true and correct copy of the letter dated April 29, 1991 is attached hereto as Exhibit "G."

12. By letter dated May 31, 1991, W. Hord Tipton, OSM Deputy Director, denied the State's TDN appeal. A true and correct copy of the May 31, 1991 letter is attached hereto as Exhibit "H."

13. By letter dated June 7, 1991 to DOGM, the Forest responded to OSM's letter of May 31, 1991 to clarify incorrect facts upon which OSM relied in denying the State's TDN appeal, stating that the Forest Service "will not consent to [Forest Road 50248] being incorporated into the mine permit area." A true and

correct copy of the letter dated June 7, 1991 is attached hereto as Exhibit "I."

14. The Forest Service letter dated June 7, 1991 also enclosed OSM correspondence dated June 23, 1981, stating that OSM has no jurisdiction over forest development lands. A true and correct copy of OSM's letter dated June 26, 1991 is attached hereto as Exhibit "J."

15. By letter dated June 19, 1991 from the Forest to Robert H. Hagen, OSM Albuquerque Field Office, the Manti-LaSal Forest Supervisor forwarded his letter of June 7, 1991 and requested OSM to withdraw the TDN on Forest Road 50248 due to lack of jurisdiction and incorrect facts. A true and correct copy of the June 10, 1991 letter is attached hereto as Exhibit "K."

16. By letter dated June 19, 1991, the State appealed W. Hord Tipton's decision to Harry Snyder, Director of OSM. A true and correct copy of the June 19, 1991 letter is attached hereto as Exhibit "I."

17. By letter dated May 20, 1981 to DOGM, the Forest stated that Forest Road 50248 is a forest development road, but not a "public road" under Forest terminology. The letter clarified that a "public road" is a "road which was constructed prior to the reservation of the National Forest" under 43 U.S.C. § 932. A true and correct copy of the letter dated May 20, 1981 is attached hereto as Exhibit "M."

18. On June 28, 1991, OSM modified the NOV to allow "road widening and paving activities required and approved by the U.S. Forest Service." A true and correct copy of the modification dated June 28, 1991 is attached hereto as Exhibit "N."

19. DOGM had received no response to this appeal as of June 26, 1991, when the NOV was issued by OSM to Petitioner.

ARGUMENT

I. **FOREST ROAD 50248 IS A FOREST SERVICE ROAD AND DOES NOT CONSTITUTE SURFACE COAL MINING OPERATIONS SUBJECT TO PERMIT**

The NOV cites Petitioner for failure to permit Forest Road 50248 pursuant to 30 C.F.R. § 773.11(a) which provides:

. . . No person shall engage in or carry out any surface coal mining operations, unless such person has first obtained a permit issued by the regulatory authority . . .
[emphasis added].

30 C.F.R. § 773.11(a) (1990). In addition, the NOV cites Petitioner for violations of Utah Administrative Code ("U.A.C.") 614-300-112.400 (1990) which provides, ". . . all persons who engage in and carry out any coal mining and reclamation operations will first obtain a permit from the Division . . ."
[emphasis added]. However, Forest Road 50248 is a public road and therefore does not meet the definition of "surface coal mining operations" under Section 701(28)(B) of the federal Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S. Code § 1291(28)(B) (1982) or "coal mining and reclamation operations" under § 40-10-3(17)(18) of the Utah Coal Mining and Reclamation Act ("UMCRA").

In Harman Mining Corp. v. OSMRE, 659 F.Supp. 806 (W.D. Va. 1987), federal district Judge Williams ruled that public roads do not constitute "surface coal mining operations" as that term is defined in Section 701(28)(B) of SMCRA. This ruling was specifically confirmed and followed by the Interior Board of Land Appeals ("IBLA") upon review of the matter on remand in Harman Mining Corp. v. OSMRE, 110 IBLA 98 (1989), and is controlling in this case. The regulatory context in which the NOV was issued at the Crandall Canyon Mine is nearly identical to that arising in Harman. Judge Williams and IBLA adopted the same criteria and analysis to determine that a county road was a public road not subject to permit. As in this case, OSM and state haul road policies were invalidated under Judge Flannery's ruling In re Permanent Surface Mining Regulation Litigation, 320 F.Supp. 1519 (D.C.C. 1985) finding the definition of "affected area" at 30 C.F.R. § 701.5 inconsistent with the definition of "surface coal mining operations" under Section 701(28) of SMCRA. Under the facts in Harman, OSM had not adopted a new rule; therefore, Judge Williams was left with no federal regulation concerning what constitutes a public road. 659 F.Supp. at 810. Similarly in this case, OSM has still neither adopted a new public road policy nor approved Utah's emergency regulations defining public roads.

Without definition under state or federal regulatory programs, Judge Williams looked to Section 701(28) of SMCRA which defines "surface coal mining operations" to include:

The areas upon which [surface coal mining] activities occur or where such

activities disturb the natural land surface, such areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the use of existing roads to gain access to the site of such activities for haulage [emphasis added].

Judge Williams rejected a literal interpretation of Section 701(28)(B) of SMCRA on the basis that:

Congress did not anticipate that operators would have to permit interstate highways or four lane state routes nor that they would have to permit every road used to haul coal, whether four lane or two lane, state or county, paved or unpaved, or even public or private.

659 F.Supp. at 811. The strict constructionist view of Section 701(28)(B) of SMCRA was rejected in favor of an examination of the evidence in the record regarding whether the roads in question were public roads. 659 F.Supp. at 812. Judge Williams reviewed the record to determine public use of the roads, use of public money to construct, improve and maintain the roads and unrestricted access of the public to the roads. In addition, Judge Williams looked to state and county law in determining whether the roads are public. 659 F.Supp. 812. The IBLA closely followed Judge Williams' analysis in making a public road determination resulting from remand of this issue to the U.S. Department of the Interior. Harman Mining Corp. v. OSMRE, 110 IBLA 98. Due to the similarity in factual and regulatory contexts between Harman and this matter, the public road criteria adopted therein controls the determination in this case.

Under the public road criteria developed by Judge Williams in Harman, Forest Road 50248 constitutes a public road which is not subject to permit under SMCRA or UCMRA. The March 27, 1991 letter from Manti-LaSal National Forest, attached hereto as Exhibit "F," establishes the public road status of Forest Road 50248. The letter confirms that the road was designated as a Forest Development Road under jurisdiction of the Manti-LaSal National Forest. The letter confirms that the road provides public access for administration and use of all National Forest resources and has been in existence since the 1930's. Id. By letter dated June 7, 1991, attached hereto as Exhibit "I," the Forest clarifies that Forest Road 50248 continues past Crandall Canyon Mine and terminates at a trail head/parking facility for public access to unroaded Forest lands. The March 29, 1991 letter indicates that Genwal has been issued a Road Use Permit for Forest Road 50248, but this permit authorizes non-exclusive use, i.e., the operator does not have jurisdiction to deny public access. The Forest establishes construction and maintenance standards for Forest Road 50248 and is the only entity authorized to restrict use pursuant to 30 C.F.R. § 212.7. Id. The Road Use Permit requires Genwal to reconstruct Forest Road 50248 to accommodate projected Mine traffic and establishes reclamation and bonding requirements regarding reduction of road width upon completion of mining. Letters dated March 29, 1991, attached hereto as Exhibit "F" and June 7, 1991, attached hereto as Exhibit "I."

The Forest states that Forest Road 50248 is a public access road but is not a "public road" as that term is used in Forest Service regulations. This issue is clarified in the Forest's letter dated May 20, 1981, attached hereto as Exhibit "M," as follows:

To differentiate, a public road is a road which was constructed prior to reservation of the National Forest (on National Forest lands) for which the public right of way has been accepted by a public road agency.

Therefore, although not a "public road" under Forest Service terminology, Forest Road 50248 does meet the public road criteria set by Harman due to public use, maintenance and unrestricted access and is outside the jurisdiction and control of the Petitioner. Therefore, Petitioner respectfully requests that the NOV requiring, permitting and/or reclamation of Forest Road 50248 be vacated in its entirety.

II. THE STATE OF UTAH HAS TAKEN APPROPRIATE ACTION IN RESPONSE TO THE TDN

OSM has inappropriately issued the NOV over the objection of the state regulatory authority after the State took appropriate action in response to the TDN. The State determined that no enforcement action was appropriate in response to the TDN. The IBLA will vacate a notice of violation where the record establishes that the action of the state was "appropriate" under the specific facts of the case. Harman Mining Corp. v. OSMRE, 110 IBLA 98 (1989); Turner Brothers Inc. v. OSMRE, 99 IBLA 87

(1987). In Harman Mining Corp. v. OSMRE, 110 IBLA 98 (1989), the IBLA determined that the State of Virginia had taken appropriate action in response to OSM's TDN regarding the permitting of a county road. In that case, the State of Virginia determined that the county road was a public road not subject to permitting and, therefore, took no enforcement action under the TDN. On remand of the OSM's subsequent NOV, the IBLA applied the public road criteria developed in Harman Mining Corp. v. OSMRE, 659 F.Supp. 806 (W.D. Va. 1987), and determined that the state action in response to the TDN was appropriate, thereby vacating OSM's subsequent NOV.

Similarly, in this case in responding to OSM's TDN, the State of Utah indicated that no enforcement action against Petitioner was appropriate. See DOGM letter dated March 27, 1991 attached hereto as Exhibit "C." The State responded to the TDN by indicating it had requested the Petitioner to confirm the public road status of Forest Road 50248 with Manti-LaSal National Forest under the criteria set forth in the State's emergency rulemaking regarding public roads. In response to this inquiry, the Forest provided the March 29, 1991 letter supporting a finding that Forest Road 50248 is a public road not subject to permit under DOGM's program. The State also asserted that OSM's TDN was untimely due to the fact that the State had adopted public road definitions and policies submitted to OSM for approval and OSM approval was pending at the time the TDN was issued. Id. Finally, the State responded that it could not make a

determination as to whether the Forest Road 50248 bridge allegedly causing contributions to streamflow was within its jurisdiction until the public road determination was made. OSM upheld the TDN over the protest of the State by letter dated May 31, 1991, attached hereto as Exhibit "H." The Manti-LaSal Forest challenged Mr. Tipton's decision as unwarranted in fact and beyond the scope of OSM jurisdiction. Forest letters dated June 7, 1991, attached hereto as Exhibit "I," and June 10, 1991, attached hereto as Exhibit "K." This response by the Forest clearly corroborates a finding that Forest Road 50248 is a public road not subject to permit under DOGM's program. Therefore, the State's action was appropriate in response to the TDN, the NOV was inappropriately issued and should be vacated.

III. NEITHER DOGM NOR OSM HAS JURISDICTION OVER FOREST ROAD 50248

Correspondence in the record from Manti-LaSal National Forest clearly states that the Forest has exclusive jurisdiction and control over Forest Road 50248. By letter dated June 7, 1991, the Forest states:

The Crandall Canyon Road is a Forest Development Road that has historically provided access for management and use of National Forest System Lands. The road is managed by and under jurisdictional control of the Forest Service consistent with 36 CFR 212. The Forest Service reserves its authority to manage/control Forest Development Roads as provided by statute and will not consent to their being incorporated into the mine permit area [emphasis added].

Id. 36 C.F.R. § 212; § 261.54 (1990).

Pursuant to 23 U.S.C. § 101(a), "the term 'forest development roads and trails' means a forest road or trail under the jurisdiction of the Forest Service."

In addition, it is clear that reclamation of a state highway under the terms required by the NOV is inconsistent with public policy. Neither Petitioner, OSM or DOGM has jurisdiction or authority to dismantle and reclaim a public access roadway. In this regard, OSM's NOV is arbitrary and capricious, in bad faith and may constitute grounds for recovery of Petitioner's attorneys' fees and costs.

In sum, under Utah State law and sound public policy, neither Petitioner, OSM nor DOGM have jurisdiction or authority to permit and/or reclaim Forest Road 50248. Therefore, the NOV must be vacated.

IV. THE NOV IS BARRED BY THE APPLICABLE STATUTES OF LIMITATION

The NOV alleges that Petitioner is in violation of UCMRA and implementing rules at U.A.C. 614-300-112.400 and of SMCRA and implementing rules at 30 C.F.R. § 773.11(a). The NOV is, however, barred under the applicable statutes of limitation of both state and federal law. In enforcing Utah law, OSM is subject to the two year statute of limitations applicable to UMCRA. Pursuant to Section 40-8-9(2) of UMCRA:

No suit, action or other proceeding based upon a violation of this chapter or any rule or order issued under this chapter may be commenced or maintained unless the suit, action or proceeding is commenced within two years of the date of the alleged violation.

This two year statute of limitations is incorporated into UCMRA pursuant to Utah Code Ann. § 40-10-4. The applicable statute of limitations for enforcing violations under SMCRA is set forth at 28 U.S.C. § 2462 as "five years from the date when the claim first accrued."

Forest Road 50248 has been recognized as a public road by OSM during the permitting and re-permitting of the Crandall Canyon Mine. The Forest noted this in their letter dated June 7, 1991, "the original Crandall Canyon Mine Permit issued by the Office of Surface Mining on November 24, 1982, determined that the Road Use Permit/Forest Service jurisdiction is consistent with the Surface Mining Control & Reclamation Act." Judge Flannery entered his decision in In re Permanent Surface Mining Regulation Litigation, 620 F.Supp. 1519 (D.C.C. 1985), remanding 30 C.F.R. § 701.5 and finding OSM's public road policy to be inconsistent with Section 701(28) of SMCRA. Therefore, under OSM's interpretation of SMCRA, as set forth in the June 26, 1991 NOV, Petitioner has been in violation of state and federal law since Judge Flannery's ruling in 1985. However, OSM did not issue its NOV in this matter for some six years following the ruling in In re Permanent Surface Mining Regulation Litigation. During this period, the Crandall Canyon Mine permit was reviewed by state and federal regulatory authorities and reissued effective June 14, 1989. Therefore, the NOV issued more than six years from the date of the alleged violation, is barred by the

applicable statutes of limitation under both state and federal law and must be vacated in its entirety.

V. THE NOV IS BARRED BY WAIVER, ESTOPPEL AND LACHES

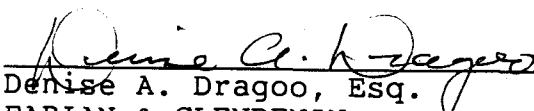
If for some reason the NOV is not barred by the statute of limitations under state and federal law, the NOV is barred by the common law doctrines of waiver, estoppel and laches. Since enactment of SMCRA in 1977 until the recent issuance of the NOV, OSM has consistently found that Forest Road 50248 is a public road not subject to the permitting or regulatory requirements of SMCRA or UCMRA. Letter dated June 7, 1991, attached hereto as Exhibit "I." OSM did not find Forest Road 50248 to be a surface coal mining operation when the Crandall Canyon permit was reviewed by state and federal regulatory authorities and reissued effective June 14, 1989. The State relied on OSM's determination of the operator's compliance in issuing the Crandall Canyon permit to Petitioner. This reliance resulted in issuance of a TDN, to the detriment of DOGM. Therefore, OSM is now estopped from issuing either the TDN or the subsequent NOV.

A period of more than six years has passed since Judge Flannery's ruling in In Re Permanent Surface Mining Regulation Litigation, 320 F.Supp. 519 (D.C.C. 1985). During the six year period of time since that ruling, OSM failed to promulgate a regulation regarding public roads. However, OSM has adopted a policy regarding Forest Road 50248. OSM approved reissuance of the Crandall Canyon Mine permit on June 14, 1989 without requiring DOGM regulation of Forest Road 50248. Therefore, OSM has either

waived regulation of Forest Road 50248 or has applied a policy of non-regulation for sufficient length of time that it is now barred by waiver or laches from issuing the NOV.

For the reasons stated above, Petitioner requests the Office of Hearings & Appeals to vacate the NOV in its entirety.

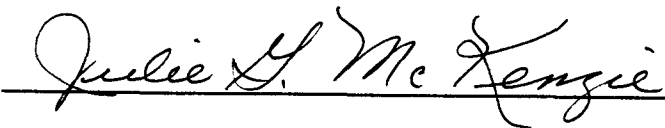
DATED this 26th day of July, 1991.


Denise A. Dragoo, Esq.
FABIAN & CLENDENIN,
a Professional Corporation
Attorneys for Petitioner
215 South State Street
Twelfth Floor
P.O. Box 510210
Salt Lake City, Utah 84151
(801) 531-8900

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing Petition for Review and Request for Hearing to be mailed, via certified mail, return receipt request, this 26th day of July, 1991, to:

Assistant Regional Solicitor for Surface Mining
United States Department of the Interior
P.O. Box 25007
Denver Federal Center
Denver, Colorado 80225-0007



DAD:072691b

EXHIBIT "A"

U.S. DEPARTMENT OF THE INTERIOR Office of Surface Mining Reclamation and Enforcement NOTICE OF VIOLATION				1. Notice of Violation Number 91 — 02 — 244 — 3	
2. Name Genwal Coal Company			<input checked="" type="checkbox"/> Permittee <input type="checkbox"/> No Permit		TV 1
3. Mailing Address P.O. Box 1201, Huntington, UT 84527			Originating Office Address USDI-OSM Albuquerque Field Office 625 Silver Ave., SW Suite 310 Albuquerque, NM 87102		
4. Name of Mine Crandall Canyon			<input type="checkbox"/> Surface <input checked="" type="checkbox"/> Underground		Telephone Number (505) 766-1486
5. Telephone Number (801) 687-9813	6. County Emery	State Utah		9. Date of Inspection June 26, 1991	
7. Operator's Name (if other than permittee) Same as above.			10. Time of Inspection From 11:30 a.m. To 1:00 p.m.		
8. Mailing Address					
11. State Permit Number ACT/015/032	12. NPDES Number	13. MSHA ID Number 42-01715	14. OSM Mine Number N/A		
<p>UNDER THE AUTHORITY OF THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 (P.L. 95-87; 30 U.S.C. 1201), THE UNDERSIGNED AUTHORIZED REPRESENTATIVE OF THE SECRETARY OF THE INTERIOR has conducted an inspection of the above mine on the above date and has found violation(s) of the Act, the regulations or required permit condition(s) listed in the attachment(s). This Notice constitutes a separate Notice of Violation for each violation listed.</p> <p>You must abate each of these violation(s) within the designated abatement time. You are responsible for doing all work in a safe and workmanlike manner.</p> <p>THE UNDERSIGNED AUTHORIZED REPRESENTATIVE HEREBY FINDS THAT THIS NOTICE <input checked="" type="checkbox"/> DOES NOT <input type="checkbox"/> DOES REQUIRE CESSATION OF MINING EXPRESSLY OR IN PRACTICAL EFFECT. Therefore, you <input type="checkbox"/> are <input checked="" type="checkbox"/> are not entitled to an informal public hearing on request, within 30 days after service of this notice (30 CFR 722.15).</p> <p>This Notice shall remain in effect until it expires as provided on the reverse or is modified, terminated, or vacated by written notice of an authorized representative of the Secretary. The time for correction may be extended by an authorized representative for good cause. If you need additional time to correct the violation(s), please contact the field office named above.</p>					
IMPORTANT—Please Read Information on the Back of this Page					
15. Print Name of Person Served Allen Childs.		18. Date of Service June 26, 1991			
16. Print Title of Person Served Mine Manager		19. Print Name of Authorized Representative Gary L. Fritz			
17. Signature of Person Served		20. Signature of Authorized Representative		ID Number 244	

U.S. DEPARTMENT OF THE INTERIOR
Office of Surface Mining Reclamation and Enforcement

NOV Number
91 — 02 — 244 — 3
Violation Number
1 of 1

NOTICE OF VIOLATION (CONTINUATION)

NATURE OF PERMIT CONDITION VIOLATED, PRACTICE OR VIOLATION

Failure to first obtain a permit from the Division (DOGM) prior to engaging in and carrying out any coal mining and reclamation operations.

PROVISION(S) OF THE REGULATIONS, ACT OR PERMIT VIOLATED

UCA 40-10-1 et seq.

R614-300-112.400

PL 95-87 Sec 506(a)

30 CFR 773.11(a)

PORTION OF THE OPERATION TO WHICH NOTICE APPLIES

This Notice applies to the Crandall Canyon Mine haul road from the present permit boundary, approximately 1.3 miles, to State Highway No. 31.

CORRECTIVE ACTION REQUIRED (Including Interim Steps, if Any)

- (1) Reclaim within 80 days or submit a complete and adequate plan, in accordance with R614-300 and the State program, to permit and bond the haul road identified above to the Utah Division of Oil, Gas and Mining (DOGM) within 30 days of receipt of this Notice.
- (2) Diligently pursue abatement of this Notice (plan approval) not to exceed 80 days from Notice issuance.
- (3) Implement permitting and bonding plan as per plan approval.
- (4) Cease the further construction or improvement of the access/haul road until permitted in accordance with the approved State program.
- (5) Cease any practice or correct any condition resulting in adverse environmental impacts.

TIME FOR ABATEMENT (Including Time for Interim Steps, if Any)

- (1) Reclaim within 80 days or submit plan to DOGM within 30 days from receipt of this Notice at 4:30 p.m., by the thirtieth day (7/26/91).
- (2) 80 days from receipt of this Notice at 4:30 p.m., by the eightieth day (9/14/91).
- (3) Upon plan approval.

EXHIBIT "B"

Reclamation and Enforcement

TEN-DAY NOTICE

625 Silver Ave. SW, Ste. 310

Albuquerque, NM 87102

Number: X - 91 - 02 - 246 - 2 TV 2

Telephone Number: (505) 766-1486

Ten-Day Notice to the State of Utah - Division of Oil, Gas and Mining

You are notified that, as a result of a federal inspection (e.g. a federal inspection, citizen information, etc.) the Secretary has reason to believe that the person described below is in violation of the Act or a permit condition required by the Act. If the State Regulatory Authority fails within ten days after receipt of this notice to take appropriate action to cause the violation(s) described herein to be corrected, or to show cause for such failure and transmit notice of your action to the Secretary through the originating office designated above, then a Federal inspection of the surface coal mining operation at which the alleged violation(s) is occurring will be conducted and appropriate enforcement action as required by Section 521(a)(1) of the Act will be taken.

Permittee: Genwal Coal Co.

(Or Operator if No Permit)

County: Emery☐ SurfaceMailing Address: P.O. Box 1201, Huntington, UT 84527☒ UndergroundPermit Number: ACT/015/032Mine Name: Crandall Canyon☐ Other _____

NATURE OF VIOLATION AND LOCATION: Failure to obtain a permit from the Utah - DOGM prior to engaging in and carrying out coal mining and reclamation operations.

Section of State Law, Regulation or Permit

Condition believed to have been violated: R614-300-112.400

~~NATURE OF VIOLATION AND~~ LOCATION: Located at the Crandall Canyon mine haulroad, from the present permit boundary to State Highway #31.

Section of State Law, Regulation or Permit

Condition believed to have been violated:

NATURE OF VIOLATION AND LOCATION: SEE CONTINUATION SHEET

Section of State Law, Regulation or Permit

Condition believed to have been violated:

Remarks or Recommendations: Submit permitting and location information to DOGM for the haulroad described above.

Date of Notice: 3/21/91

CERT. RECLIFT # P 965 729 046

Signature of Authorized Rep.: Print Name and ID: Jeffrey J. Zinn, #246

Distribution: Original-State's Copy, Blue-Field Office, Yellow-Inspector's Copy

IE-160 (3/81)

Reclamation and Enforcement

TEN-DAY NOTICE
(Continuation Sheet)

625 Silver Ave. SW, Ste. 310

Albuquerque, NM 87102

Telephone Number: (505) 766-1486

Number X- 91 - 02 - 246 - 2 TV 2

Ten-Day Notice to the State of Utah - Division of Oil, Gas and Mining

NATURE OF VIOLATION AND LOCATION: Failure to prevent, to the extent possible, additional contributions of sediment to streamflow.

Section of State Law, Regulation or Permit

Condition believed to have been violated: 3614-301-742.111

NATURE OF VIOLATION AND LOCATION: The beginning of the Crandall Canyon unpermitted haulroad, at all locations around the bridge over Huntington Creek, where mud flows have been leaving the haulroad and entering Huntington Creek.

Section of State Law, Regulation or Permit

Condition believed to have been violated:

NATURE OF VIOLATION AND LOCATION:

Section of State Law, Regulation or Permit

Condition believed to have been violated:

NATURE OF VIOLATION AND LOCATION:

Section of State Law, Regulation or Permit

Condition believed to have been violated:

NATURE OF VIOLATION AND LOCATION:

Section of State Law, Regulation or Permit

Condition believed to have been violated:

Remarks or Recommendations: The permittee should enact a long-term treatment plan including, among other things, additional road surfacing, other treatment, and a series of measures to keep the road surface and slopes from eroding into Huntington Creek.

Date of Notice: 3/21/91

REPT. RECEIPT # P965 795 046

Signature of Authorized Rep: [Signature]

Print Name and ID: Jeffrey J. Zappa, 125



State of Utah

EXHIBIT "C"

DEPARTMENT OF NATURAL RESOURCES
DIVISION OF OIL, GAS AND MINING

Norman H. Bangert
Governor

Dee C. Hansen
Executive Director

Dianne R. Nielson, Ph.D.
Division Director

355 West North Temple
3 Third Center, Suite 350
Salt Lake City Utah 84100-1203
801-538-5340

March 27, 1991

CERTIFIED RETURN RECEIPT REQUESTED
P 755 090 786

Mr. Robert Hagen, Director
Office of Surface Mining
Reclamation and Enforcement
Suite 310, Silver Square
625 Silver Avenue, S. W.
Albuquerque, New Mexico 87102

Dear Mr. Hagen:

Re: TDN #X91-02-246-002 TV2, Genwal Coal Company, Crandall Canyon Mine,
ACT/015/032, Folder #5, Emery County, Utah

This letter is in response to the above-referenced Ten-Day Notice, certified copy received March 25, 1991.

Number 1 of 2 reads: "Failure to obtain a permit from the Utah - DOGM prior to engaging in and carrying out coal mining and reclamation operations." Regulation cited is R614-300-112.400 and the location is "the Crandall Canyon mine haulroad, from the present permit boundary to State Highway #31."

Division Response: The road in question is categorized as a forest development road by the Manti-La Sal National Forest. Maintenance, physical and environmental performance standards and performance bonds are dictated by Manti-La Sal to ensure compliance with the USDA's requirements. To test the applicability of this road under Utah's emergency rule making definition of "Roads", "Public Roads", Genwal was sent a letter on March 22, 1991 asking for additional information on that road. Upon receipt of this information the Division will make a finding of permitability

Page 2
Robert Hagen
TDN #X91-02-246-002 TV2
March 27, 1991

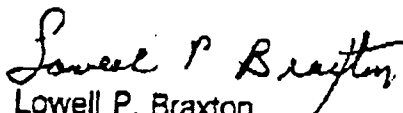
or non-permitability under the "Roads", "Public Roads" criteria. If permitting is required Genwal will be required to submit the requisite applications for a permit change within thirty (30) days of receipt of notice.

Since #1 of 1 was issued after the Division's request for information was made, and prior to a reasonable time for the Division to implement the emergency rule making, #1 of 1 should be withdrawn.

Number 2 of 2 reads: "Failure to prevent, to the extent possible, additional contributions of sediment to streamflow. The regulation cited is R614-301-742.111 and the location is "The beginning of the Crandall Canyon unpermitted haulroad, at all locations around the bridge over Huntington Creek, where mud flows have been leaving the haulroad and entering Huntington Creek.

Division Response: The Division has not made a finding that the bridge environs cited in #2 of 2 fail within the regulatory domain of the Utah program and SMCRA. Pending this decision (see response in #1 of 2 of this TDN) there is no basis to allege a violation of the Utah program. Accordingly, #2 of 2 should be withdrawn pending a decision of permitability for the Crandall Canyon road.

Sincerely,


Lowell P. Braxton
Associate Director, Mining

mbm
cc: Daron R. Haddock
Joe Helfrich
Stephen Demczak
CRANCANY.TDN

ATTACHMENT 1

MAR 04 1991

BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

ALBUQUERQUE FIELD OFFICE

---oo0oo---

MODIFICATION BY EMERGENCY	:	NOTICE OF
RULEMAKING REGARDING		EMERGENCY
UTAH ADMIN. R. 614-100-200,	:	RULEMAKING
DEFINITIONS OF "ROAD" AND		
"PUBLIC ROAD"		

---oo0oo---

The Board of Oil, Gas and Mining has determined that the definition of "road" and "public road" in Utah Admin. R. 614-100-200 warrants modification by emergency rulemaking and further explanation by the Board as to its purpose and intent in adopting these rules.

FINDINGS OF FACT

THE BOARD, AFTER CAREFUL EXAMINATION FINDS THAT:

1. Utah coal regulatory program rules are required by Public Law 95-87 to be no less effective than the federal program counterpart regulations;

2. The Utah statute, Utah Code Ann. 40-10-6.5, requires as a condition of validity that the rules implementing the Utah coal regulatory program be no more stringent than those required under the counterpart federal program regulations;

3. The Board of Oil, Gas and Mining adopted definitions of "road" and "public road" in Utah Admin. R. 614-100-200 to be effective June 1, 1990 (Attachments A and B);

4. Effective April 12, 1990, the Office of Surface Mining approved the Board's definition of "public road" and disapproved the definition of "road;"

5. On October 1, 1990, the Board of Oil, Gas, and Mining adopted a revised definition of "road" (Attachment A);

6. The Division has developed a proposed "Policy for Implementation of Site Specific Determinations of the Public Status of Roads" (Attachment C);

7. Reconsideration and evaluation of the permit status of those "public roads" cannot proceed in the absence of a definition of "road";

8. Mine plans approved by the Division of Oil, Gas and Mining and the Office of Surface Mining designate certain roads as "public roads" not subject to permitting under the Utah coal regulatory program;

9. Despite sufficient time and in violation of its own regulations concerning time frames for action on a program amendment, the Office of Surface Mining has failed to approve or deny the proposed program amendment for the definition of "road"; and

10. As a result of the failure of the Office of Surface Mining to take action, the Utah coal regulatory program rules contain no definitions for "road" and no exclusion of a public road from the definition of a "road" or "affected area";

CONCLUSIONS OF LAW

1. The Federal District Court decisions, In Re: Permanent Surface Mining Regulation Litigation (II), 620 F. Supp. 1519, 1581-82 (D.D.C. 1985) as modified by National Wildlife Federation v. Hodel, 839 F.2d 694 (D.C. Cir. 1988) and Harmon Mining Corporation v. Office of Surface Mining Reclamation and Enforcement, 659 F. Supp. 806 (W.D. Va. 1987) did not find a requirement of inclusion of public roads in the definition of a road under § 701(28)(B) of SMCRA;

2. The existing Utah criteria concerning whether a road's nonmining use is substantial (more than incidental) has been expressly rejected and remanded in In Re: Permanent Surface Mining Regulation Litigation (II), SMCRA, and must therefore be removed from Utah Admin. R. 614-100-200 definition of "public road" as required by 51 Fed. Reg. 41960, Nov. 20, 1986; and

3. 30 C.F.R. § 701.5 provides for the exclusion of certain public roads from regulation. Therefore, the Utah coal regulatory program rules are improperly promulgated because they are more stringent than the federal counterpart regulations. Therefore, in the absence of enforceable rules for the definitions of "road" and "public road," the Utah coal regulatory program rules are less effective than the federal program counterpart regulations.

ORDER

NOW THEREFORE, so as to be in compliance with State and Federal law, this Board does enter into emergency rulemaking, whereby:

1. The definition of "road" as presented in proposed rulemaking in DAR File #10936, having been offered for public comment on July 26, 1990, and adopted by the Board on October 1, 1990, is to be made effective immediately, pursuant to this emergency rulemaking. The Board takes this action irrespective of the statement in Utah Admin. R. 614-100-130 regarding the effective date;

2. The definition of "public road," as amended and stated in Attachment B, is to be made effective immediately, pursuant to this emergency rulemaking;

3. Published concurrently with this notice is a Division of Administrative Rules notice of emergency rulemaking which officially enters the October 1, 1990 definition of "road" into effective rule status for a period of one hundred and twenty days from the date of this Order, with intent to complete formal rulemaking within that time period;

4. Published concurrently with this notice is a Division of Administrative Rules notice of emergency rulemaking which officially enters the amended definition of "public road" (Attachment B) into effective rule status for a period of one hundred and twenty days from the date of this order, with intent to complete formal rulemaking within that time period;

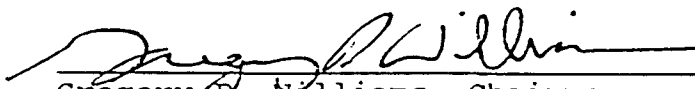
5. The effect of this emergency rulemaking is to grant to the Division the ability to effectively regulate coal haul roads in the State of Utah. Further, it provides an articulable basis for individual evaluations of roads as to their public status to determine whether or not they are subject to permitting;

6. The Division shall implement its "Policy for the Implementation of Site Specific Determinations of the Public Status of Roads" (Attachment C);

7. The Division shall develop an action plan for evaluating mine roads for permitting requirements; and

8. In accordance with the Utah Administrative Rulemaking Act (U.C.A. 63-46a-7) and Rule R2-4-8, the temporary (emergency) rule changes to R614-100-200 will be made subject to the regular rulemaking process and open for public comment at a regular hearing before the Board.

ORDERED this 25th day of February, 1991.


Gregory D. Williams, Chairman
Board of Oil, Gas and Mining

Attachment A

Definition of "Road"

Adopted by Board of Oil, Gas and Mining, June 1, 1990
Disapproved by Office of Surface Mining, April 12, 1990
Rescinded by Board of Oil, Gas and Mining, October 1, 1990

"Road" means a surface right-of-way for purposes of travel by land vehicles used in coal exploration or coal mining and reclamation operations. A road consists of the entire area within the right-of-way including the roadbed, shoulders, parking and side areas, approaches, structures, ditches, and surface. The term includes access and haul roads constructed, used, reconstructed, improved, or maintained for use in coal exploration, or within the affected area of coal mining and reclamation operations, including use by coal hauling vehicles leading to transfer, processing, or storage areas. The term does not include public roads when an evaluation of the extent of the mining related uses of the road to the public uses of the road has been made by the Division or roads within the immediate mining-pit area.

Adopted by the Board of Oil, Gas and Mining, October 1, 1990,
pending approval by the Office of Surface Mining
No action by the Office of Surface Mining as of February 20, 1991

"Road" means a surface right-of-way for purposes of travel by land vehicles used in coal exploration or coal mining and reclamation operations. A road consists of the entire area within the right-of-way including the roadbed, shoulders, parking and side areas, approaches, structures, ditches, and surface. The term includes access and haul roads constructed, used, reconstructed, improved, or maintained for use in coal exploration, or within the affected area of coal mining and reclamation operations, including use by coal hauling vehicles leading to transfer, processing, or storage areas. The term does not include {public roads when an evaluation of the extent of the mining related uses of the road to the public uses of the road has been made by the Division or} roads within the immediate mining-pit area{.} and may not include public roads as determined on a site specific basis.

ATTACHMENT B

Definition of "Public Road"

Adopted by Board of Oil, Gas and Mining, June 1, 1990
Approved by Office of Surface Mining, April 12, 1990

"Public Road" means a road (a) which has been designated as a **public road pursuant to the laws of the jurisdiction in which it is located**, (b) which is maintained with public funds in a manner similar to other public roads of the same classification within the jurisdiction, (c) for which there is substantial (more than incidental) public use, and (d) which meets road construction standards for other public roads of the same classification in the local jurisdiction.

Amended and adopted by Board of Oil, Gas and Mining as emergency rule, February 25, 1991
Proposed to Office of Surface Mining for program amendment,
February 25, 1991

"Public Road" means a road (a) which has been designated as a public road pursuant to the laws of the jurisdiction in which it is located, (b) which is maintained with public funds in a manner similar to other public roads of the same classification within the jurisdiction, ~~((c) for which there is substantial (more than incidental) public use,)~~ and ~~((d)~~ (c) which meets road construction standards for other public roads of the same classification in the local jurisdiction.



State of Utah

DEPARTMENT OF NATURAL RESOURCES DIVISION OF OIL, GAS AND MINING

Norman H. Bangertter
Governor

Dee C. Hansen
Executive Director

Dianne R. Nielson, Ph.D.
Division Director

355 West North Temple
3 Triad Center, Suite 350
Salt Lake City, Utah 84180-1203
801-538-5340

ATTACHMENT C

DIVISION OF OIL, GAS AND MINING POLICY FOR THE IMPLEMENTATION OF SITE SPECIFIC DETERMINATIONS OF THE PUBLIC STATUS OF ROADS UNDER R614-100-200

Effective Date: February 25, 1991
Authorized By: Dianne R. Nielson
Director

Summary Determination

The purpose of this memorandum is to provide direction for Division staff in determining if an "access and/or haulage road" is a "public road" in the context of coal mining and reclamation operations under the Utah Coal Regulatory Program, Utah Code Ann. § 40-10-1 et seq. and Utah Admin. R. 614 et seq. If such a road is determined to be a "public road," it will not be subject to permitting under the Program.

Attempts to establish specific criteria which a road must meet in order to qualify as a public road have proved unworkable. Each road must be evaluated on a case-by-case basis. It is possible, however, to delineate criteria which will be considered in conducting that case-by-case determination. With that distinction in mind, the following procedure will be used to evaluate roads associated with existing and proposed Mining and Reclamation Plans. Roads associated with Reclamation Only Plans and operations in final reclamation and bond release will not be reevaluated or redesignated under this policy.

1. Identify all roads, located within the boundary of the permit area and providing access to the permit area, which will be used in conjunction with operations under the Mining and Reclamation Plan. (Roads which are presumptively subject to permitting.)
2. Consider the status or use of the road with respect to the following criteria:
 - a. Whether the road is designated as a public road pursuant to the laws of the jurisdiction in which it is located;

- b. Whether the road is maintained with public funds in a manner similar to other public roads of the same classification within the jurisdiction;
 - c. Whether the road meets road construction standards for roads of the same classification in the local jurisdiction; and
 - d. Whether the permittee has authority to deny access.
- 3. Consider other relevant state statutes or case law on the subject of public roads.
 - 4. Consider other relevant facts and circumstances regarding the particular road, including existing performance standards made a part of a land use permit.
 - 5. Prepare a written finding as to whether the road is or is not a public road and therefore does or does not need to be permitted. Include rationale and documentation which form the basis for the determination.

Background

The necessity for a determination regarding permitting of a road associated with a coal mining and reclamation operation is dictated by the requirement in Utah Code Ann. § 40-10-3(18)(b) as well as § 701(28)(B) of SMCRA, where "surface coal mining operations" are defined as:

The areas upon which the activities occur or where the activities disturb the natural land surface. These [Such] areas shall also include any adjacent land the use of which is incidental to the activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of the activities and for haulage... (emphasis added)

Utah developed public road classification criteria February 24, 1984, which paralleled the federal criteria adopted by OSM April 5, 1983 (48 Fed. Reg. 14,814). Subsequently, the District Court for the District of Columbia (Judge Flannery) remanded the portion of the rule, the definition of "Affected Area," which dealt with public roads. In re Permanent Surface Mining Regulation Litigation, 620 F. Supp. 1519, 1581-82 (D.D.C. 1985), modified subnom., National Wildlife Federation v. Hodel, 839 F.2d 694 (D.C. Cir. 1988). As a result, that portion of Utah's definition of "Affected Area" was also remanded under its rules on December 3, 1985. In 1985, OSM proposed to rewrite the rule defining "Affected Area." That did not occur. Instead, on November 20, 1986, (51 Fed. Reg. 41,960) OSM suspended any

possible exclusion for public roads from the definition. Road standards were clarified by OSM on November 11, 1988 (53 Fed. Reg. 45,190). In its last rulemaking, OSM stated that road classification and the jurisdictional reach of federal land management agencies regarding roads must be determined on a case-by-case basis.

The crux of the matter is that SMCRA states that every road used to gain access to a mine or for haulage related to the operations must be permitted. As John Kunz, Interior Department Staff Attorney in the Division of Surface Mining, noted in his June 13, 1990, Solicitor's Memorandum:

However, common sense dictates that in enacting § 701(28)(B), the Congress never intended that certain public roads be permitted. (p. 4)

The court, in Harman Mining Corp. v. Office of Surface Mining Reclamation and Enforcement, 659 F. Supp. 806 (W.D. Va. 1987) addressed the problem when it determined that:

Obviously, Congress did not anticipate that operators would have to permit interstate highways or four-lane state routes, nor that they would have to permit every road used to haul coal, whether four-lane or two-lane, state or county, paved or unpaved, or even public or private.

Factors Unique to the Utah Coal Program

The land use and management patterns of the western United States public domain and national forest lands differ markedly from other parts of the country. Land use, including use of roads, is guided by a number of entities, not the least of which are the federal land management agency and the county/state government. Furthermore, management of and changes in land use are prescribed in federal regional Resource Management Plans and Forest Management Plans. The public's use of lands in the vicinity of coal mining operations is generally not restricted, except where public safety requires. As such, the disturbed area of the mine is closed to the public and the balance of the national forest or public domain land adjacent to and associated with the mine is open to the public. Because of the significantly smaller "disturbed area" associated with an underground mining operation (constituting all operations in Utah) public access is significantly increased as compared to surface mines. Due to the multiple (open) use policy, public access to and maintenance of roads, which also access coal mines in Utah, is the rule, rather than the exception. Public bodies (federal, state, and county) maintain some degree of control over the majority of roads for the benefit of the public.

Discussion Of Procedure

As set forth in the first paragraph of this memorandum the methodology for determining whether or not to permit a road begins with the presumptive determination that all roads are subject to permitting which are constructed, reconstructed, improved or maintained to provide access to the mine site or for haulage. This is in recognition of the clear statutory language set forth in Utah Code Ann. § 40-10-3(18)(b), and § 701(28)(B) of SMCRA. The criteria set forth and discussed below are applied to roads which meet the statutory definition of areas where, "surface coal mining operations" occur on or disturb the natural land surface.

The criteria as set forth below are used to determine when a road has become so "public" that the statutory purpose of permitting is no longer applicable.

In his June 13, 1990, Memorandum, Kunz specifically considered the use of criteria in designating public roads.

In the past, DOGM and OSM have unsuccessfully attempted to develop an exhaustive set of criteria to define what constitutes a public road. Because of the diverse facts potentially involved, this approach appears to be misguided. Rather, it is apparent that DOGM and OSM could better apply general criteria in a case-by-case approach to determine what roads should be permitted. (p. 17)

This recommendation forms the basis for the consideration of roads on a case-by-case basis using general criteria and other relevant information, as defined in the above Summary. The criteria described in the above Summary are based on Utah's definition of "Public Road" (Utah Admin. R. 614-100-200). These are the same basic criteria suggested in the Kunz Memorandum, with one notable exception, as discussed below.

When the procedure described in the above Summary is utilized, the following factors will be considered.

Whether the road is designated as a public road pursuant to the laws of the jurisdiction in which it is located (2.a)

Definitions provided in Utah Code will be used in making determinations. Under Utah Admin. R. 614-100-200, the Board has approved the following definitions:

"Road" means a surface right-of-way for purposes of travel by land vehicles used in coal exploration or coal mining and reclamation operations. a road consists of the entire area within the right-of-way including the roadbed, shoulders,

parking and side areas, approaches, structures, ditches, and surface. The term includes access and haul roads constructed, used, reconstructed, improved, or maintained for use in coal exploration, or within the affected area of coal mining and reclamation operations, including use by coal hauling vehicles leading to transfer, processing, or storage areas. The term does not include roads within the immediate mining-pit area and may not include public roads as determined on a site specific basis.

And

"Public road" means road (a) which has been designated as a public road pursuant to the laws of the jurisdiction in which it is located, (b) which is maintained with public funds in a manner similar to other public roads of the same classification within the jurisdiction, (c) for which there is substantial (more than incidental) public use, and (d) which meets road construction standards for other public roads of the same classification in the local jurisdiction.

The definition of "Road" is pending approval by OSM as a part of the Round II Rules package. The Board has recently deleted part (c) of the definition of public road, as a result of an emergency rulemaking.

Under Utah Code Ann. § 27-12-2(8), the definition of public road is further clarified:

"Public highway" means any road, street, alley, lane, court, place, viaduct, tunnel, culvert, or bridge laid out or erected as such by the public, or dedicated or abandoned to the public, or made such in an action for the partition of real property, and includes the entire area within the right-of-way.

In applying the criteria, there are initially two types of roads subject to designation as public roads:

1. Roads which are designated as a federal, state, or county roads by the respective agency with jurisdiction, and
2. Roads on national forest or public domain land which are authorized under existing law by the land management agency as roads with public access, although the road may not be specifically designated as a public road.

In the first case, the specific designation of a road as a federal, state, or county road will be grounds for an initial determination that the road is a public road and not subject to permitting. The remaining criteria will be considered with the intent of determining if there are any factors which are contrary to the initial determination that the road need not be

permitted. This approach recognizes that, in designating the road as a federal, state, or county road, the road must meet certain standards. Authority and responsibility (liability) rest with the government agency.

If the road is not designated as a federal, state, or county road, the initial determination will be that it is not a public road. The remaining criteria will be applied, again on a **case-by-case basis, to determine if there are any considerations which support determining the road to be a public road, not subject to permitting.**

Whether the road is maintained with public funds in a manner similar to other public roads of the same classification within the jurisdiction (2.b)

When evaluating construction, reconstruction, improvements, and maintenance, consideration should be given to:

- Who has authority and responsibility for maintenance,
- Who performs the work,
- Who pays for the work,
- Who will be responsible for the maintenance of the work, and
- Whether the work is being done in lieu of other payments such as taxes or fees.

The issue here is not so much funding as it is authority and responsibility. If the road is designated as a federal, state, or county road, the maintenance is the ultimate responsibility of that government agency. For instance, the county may make arrangements with the coal operator to clear snow from the road in the winter. The arrangement is made out of convenience (operator has equipment nearby as opposed to county equipment which is 15 miles away), requirements for privatization of government services (such as snow removal), or other reasons. However, the responsibility (and liability) ultimately rest with the county.

One might argue that, if the operator maintains a road at no cost to the county, the road is not a public road and is therefore subject to permitting. Two contravening considerations arise. If the county is not overseeing or managing the maintenance, it may be failing to discharge its responsibility and protect itself from liability. However, it has not transferred jurisdiction (authority) or responsibility. The road is still a public road. On the other hand, if maintenance by the private entity (the operator) is monitored by the county, one might conclude that the county negotiated a very favorable deal for its constituents--reduced tax payer burden without reduced service. Again, jurisdiction (authority) and responsibility rest with the county. The road is a public road, not subject to

permitting.

Whether the road meets road construction standards for other public roads of the same classification in the local jurisdiction (2.c)

In order for a road to be designated as a federal, state, or county road, it must meet certain construction **criteria. Furthermore, maintenance or reconstruction is conducted in accordance with certain standards.**

Therefore, consideration of construction standards is subject to the same tests for authority and responsibility. Failure of the agency to enforce appropriate construction standards may be an act of bad faith, but it does not negate the **authority and responsibility of the government for the road.** The road is still a public road.

Under a different scenario, the county may enter into an agreement with the BLM for construction or maintenance of a road on public domain land. The BLM may impose county road standards. The question then is: If the road is not designated as a public road by the federal, state, or county, but county standards of maintenance are used for the work performed by the county, is it a public road? Who has authority and responsibility for the road? Again, that question would be answered based on the specific case and in consideration of relevant information.

Pre-existing special use road permits by a land management agency which reflect the land management agency's **determination and implementation of performance/design standards** as well as reclamation requirements and appropriate bonding provide a sufficient basis for not attempting to extend Division jurisdiction for road permitting purposes. Because the federal statute concerns itself with the impact of the surface effect of coal mining, the pre-existing federal land management disposition of impacts to the environment related to special use permits should be granted great weight by the Division in its permitting decisions.

Whether the effect of the mining use of the road is relatively minor in comparison to the other uses of the road

This criterion is proposed by the Kunz Memorandum and included in the state's initial definition of "Public Road." However, based on court rulings, this criterion is not to be used in the evaluation. As set forth above, this concept is subsumed in the original determination regarding which roads should be evaluated in the first instance.

Of particular concern as one considers this issue is

the application of a criterion addressing "more than incidental use" of a road. The court's ruling in National Wildlife Federation v. Hodel recognized the problem when it stated:

Presumably then, when hauling or access are among many uses made of a road, such as an interstate highway, the effect from the mining use is de minimis, or relatively minor, and thus the road need not be included as part of the surface coal mining operation. But, the Secretary's rule goes far beyond what is called for by section 701(28) [of SMCRA] in exempting essentially all public roads where public use is more than incidental. . . . Nor does the rule concern itself with whether the road is in some way directly, rather than incidentally, part of the mining operation. Instead, the rule focuses curiously on whether the public use is more than incidental, in which case the road is exempt. The rule does not bear a logical nexus to the Secretary's goal in promulgating it, or to the Secretary's own stated understanding of what the law requires. (emphasis added)

There is an important distinction in the ruling. That is the distinction between the road being incidental to mining (or mining having a de minimis impact on the road) as opposed to incidental use of the road. Judge Flannery ordered the definition to be remanded because, instead of focusing on whether the road was "directly, rather than incidentally, part of the mining operation," the definition focused on "whether public use is more than incidental." When a road is reviewed for consideration as a public road exempt from permitting, the road status, not just use, should be considered.

Furthermore, it is important to understand that Judge Flannery did not establish or otherwise give deference to a road criterion which evaluated incidental or de minimis use. He simply rejected OSM's argument for the criterion. The Kunz Memorandum recognizes this when it states with respect to the remand:

Judge Flannery was not attempting to definitively define criteria that must be used to determine what constitutes a public road. (emphasis added)

More recently in Harman Mining Corp. v. Office of Surface Mining Reclamation and Enforcement, the court considered numerous factors or criteria in determining that the road in question qualified as a public road and was not subject to permitting. The criteria used by the court in its analysis included:

- Jurisdiction,
- Responsibility for maintenance,
- Construction standards, and

• Public Access

The incidence of public versus private use was not a basis for the decision although evidence of use was introduced by parties. The IBLA has since adopted the analysis of the court in Harman Mining Corp. v. Office of Surface Mining Reclamation and Enforcement in its determinations regarding public roads, placing no weight on evidence of incidence of use. Therefore, to use a **criterion based on "incidental use" for the Utah Program is inconsistent with case law. This criterion, as currently stated in the Utah rule, will not be weighed in the determination of public road status and permitting requirements. Furthermore, the clause (part c of the Public Road definition) has been deleted by the Board through emergency rulemaking, in order to ensure that the Utah program is no less effective than and no more stringent than the federal program.**

Consider other relevant state statutes or case law on the subject of public roads (3)

Consider any other relevant facts and circumstances regarding the particular situation (4)

The Kunz Memorandum provides a list of suggested criteria which could be used in the case-by-case evaluation (p. 16-17). Those criteria mirror those listed in the above Summary. However, Kunz is also careful to avoid inappropriately prescriptive terms.

The listed criteria must not be considered in a vacuum. ...Accordingly, the listed criteria must be considered in the context of (the) statutory provision. (p. 16)

In addition, other relevant State statutory or case law on the subject of public roads should properly be considered in the decision-making process. As the facts and circumstances of a particular situation dictate, other relevant factors should also properly be considered. (p. 17)

For example, one consideration would be whether the coal operator has the authority to deny the public access to the road. In the context of the disturbed area of the mine, when located on public domain or national forest land, it is clear that the operator can, for health/safety reasons, deny the public access to the "public land" during the life of mine. Now, consider public access in the context of a road. If a road on public domain or national forest land provides for public access, can the operator deny access to the road by the public if the operator desires to have sole use of the road, or would the operator be required to construct a separate road? If public access cannot be denied, then a road is a public road.

ATTACHMENT 2

Surface Mining Control and Reclamation Act
30 CFR §701.5: Definitions

Utah Coal Mining and Reclamation Act
Utah Admin. R. 614-100-200: Definitions

Public Road - no definition

Affected Area means any land or water surface area which is used to facilitate, or is physically altered by, surface coal mining and reclamation operations. The affected area includes the disturbed area; any area upon which surface coal mining and reclamation operations are conducted; any adjacent lands the use of which is incidental to surface coal mining and reclamation operations; all areas covered by new or existing roads used to gain access to, or for hauling coal to or from, surface coal mining and reclamation operations, except as provided in this definition; any area covered by surface excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, shipping areas; any areas upon which are sited structures, facilities, or other property material on the surface resulting from, or incident to, surface coal mining and reclamation operations; and the area located above underground workings. The affected area shall include every road used for purposes of access to, or for hauling coal to or from, surface coal mining and reclamation operations, unless the road (a) was designated as a public road pursuant to the laws of the jurisdiction in which it is located; (b) is maintained with public funds, and constructed, in a manner similar to other public roads of the same classification within the jurisdiction; and (c) there is substantial (more than incidental) public use.

Public Road means a road (a) which has been designated as a public road pursuant to the laws of the jurisdiction in which it is located, (b) which is maintained with public funds in a manner similar to other public roads of the same classification within the jurisdiction, and (c) which meets road construction standards for other public roads of the same classification in the local jurisdiction.

Road means a surface right-of-way for purposes of travel by land vehicles used in surface coal mining and reclamation operations or coal exploration. A road consists of the entire area within the right-of-way, including the roadbed, shoulders, parking and side areas, approaches, structures, ditches and surface. The term includes access and haul roads constructed, used, reconstructed, improved, or maintained for use in surface coal mining and reclamation operations or coal exploration, including use by coal hauling vehicles to and from transfer, processing, or storage areas. The term does not include ramps and routes of travel within the immediate mining area or within spoil or coal mine waste disposal areas.

Road means a surface right-of-way for purposes of travel by land vehicles used in coal exploration or coal mining and reclamation operations. a road consists of the entire area within the right-of-way including the roadbed, shoulders, parking and side areas, approaches, structures, ditches, and surface. The term includes access and haul roads constructed, used, reconstructed, improved, or maintained for use in coal exploration, or within the affected area of coal mining and reclamation operations, including use by coal hauling vehicles leading to transfer, processing, or storage areas. The term does not include roads within the immediate mining-pit area and may not include public roads as determined on a site specific basis.

ATTACHMENT 3

"Public Road" means a road (a) which has been designated as a public road pursuant to the laws of the jurisdiction in which it is located, (b) which is maintained with public funds in a manner similar to other public roads of the same classification within the jurisdiction, ~~((e) for which there is substantial (more than incidental) public use)~~, and ~~((d)~~ (c) which meets road construction standards for other public roads of the same classification in the local jurisdiction.

"Road" means a surface right-of-way for purposes of travel by land vehicles used in coal exploration or coal mining and reclamation operations. A road consists of the entire area within the right-of-way including the roadbed, shoulders, parking and side areas, approaches, structures, ditches, and surface. The term includes access and haul roads constructed, used, reconstructed, improved, or maintained for use in coal exploration, or within the affected area of coal mining and reclamation operations, including use by coal hauling vehicles leading to transfer, processing, or storage areas. The term does not include roads within the immediate mining-pit area and may not include public roads as determined on a site specific basis.

Norman H. Baugher
Director
Dee C. Hansen
Executive Director
Dorothy R. Nielson, Ph.D.
Division Director

DEPARTMENT OF NATURAL RESOURCES
DIVISION OF OIL, GAS AND MINING

355 West North Temple
Salt Lake City, Utah 84119-0350
801-538-5240

EXHIBIT "E"

March 22, 1991

CERTIFIED RETURN RECEIPT REQUESTED
NO. 540 714 135

Mr. Allen Childs
Genwal Coal Company, Inc.
P. O. Box 1201
Huntington, Utah 84528

Dear Mr. Childs:

Re: Crandall Canyon Mine, ACT/015/032, Emery County, Utah

Effective February 25, 1991, the Board of Oil, Gas and Mining adopted emergency rules dealing with the definition of "Public Road" and "Road." These terms as defined in the emergency rulemaking are:

"Public Road" means a road, (a) which has been designated as a public road pursuant to the laws of the jurisdiction in which it is located, (b) which is maintained with public funds in a manner similar to other public roads of the same classification within the jurisdiction, and (c) which meets road construction standards for other public roads of the same classification in the local jurisdiction.

"Road" means a surface right-of-way for purposes of travel by land vehicles used in coal exploration or coal mining and reclamation operations. A road consists of the entire area within the right-of-way including the roadbed, shoulders, parking and side areas, approaches, structures, ditches and surface. The term includes access and haul roads constructed, used, reconstructed, improved or maintained for use in coal exploration, or within the affected areas of coal mining and reclamation operations, including use by coal hauling vehicles leading to processing or storage areas. The term does not include roads within the immediate mining-pit area and may not include public roads as determined on a site specific basis.

In order to make a finding that a road is a "public road" and not permissible under the Utah Coal Regulatory Program, DOGM must conduct a site-specific analysis of roads leading to permitted sites.

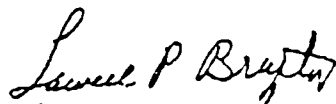
Specifically, I am asking for information on the Forest Development Road in Crandall Canyon, crossing portions of Sections 4,5,6, Township 17S, Range 7E, SLBM.

In order to facilitate this analysis, you will need to secure a letter from the U. S. Forest Service discussing the following topics:

1. The above-referenced road is/is not a public road pursuant to the laws of that agency.
2. If designated a public road, when was the designation first established?
3. How do construction standards for the Crandall Canyon Road compare with similarly classified roads with in the Manti La Sal National Forest?
4. What agency establishes construction and maintenance standards for this road?
5. Are there legal instruments that guarantee Genwal's following performance standards established by Manti La Sal National Forest?
6. Does Genwal Coal Company have the authority to deny public access to the Crandall Canyon Road?
7. Will the designation of this road (as a Forest Development Road) change after reclamation of the Crandall Canyon Mine?
8. Will the physical character of this road change after the cessation of mining.
9. Who will be responsible for making the changes, and what entity will ensure the adequacy of the post mining changes?

Please feel free to call Lowell Braxton or Ron Daniels, if you have questions about this process.

Sincerely,



Lowell P. Braxton
Associate Director, Mining

vb

cc: D. Nielson
R. Daniels
MI78/80&81

EXHIBIT "F"

Reply to: 2820

Date: March 29, 1991

Allen Childs, General Manager
Crandall Canyon Mine
P.O. Box 1201
Huntington, Utah 84528

Dear Allen:

We are in receipt of your 3/27/91 letter requesting information about the Crandall Canyon Road (Forest Development Road #50248). Specific responses to your questions are as follows:

1. The above-referenced road is/is not a public road pursuant to the laws of that agency.

The Crandall Canyon road is a Forest Development Road under the jurisdiction of the Manti-LaSal National Forest. Forest Development roads are not classified as public roads because their use can be limited and/or restricted in accordance with 36 CFR 212.7.

2. If designated a public road when was the designation first established?

This road provides access for administration and use of all National Forest resources. Records indicate the road has been in existence since the 1930's, providing public access.

3. How do construction standards for the Crandall Canyon Road compare with similarly classified roads within the Manti-LaSal National Forest?

Construction standards on this road are identical to similar roads that carry similar traffic. Traffic type/volume is the basis for determining design standards.

4. What agency establishes construction and maintenance standards for this road?

The U.S.D.A., Forest Service, Manti-LaSal National Forest establishes and administers construction and maintenance standards for this and other Forest Development Roads.

5. Are there legal instruments that guarantee Genwal's following performance standards established by Manti-La Sal National Forest?

Yes, see attached copy of the Road Use Permit which authorizes nonexclusive use of the Crandall Canyon Road. The permit requires 4

other instruments (not attached): use plans (item 2), public liability insurance (item 3), a performance bond (item 7), and a reclamation bond (item 15).

6. Does Genwal Coal Company have the authority to deny public access to the public?

No (see item 4 of permit). The Forest Supervisor of the Manti-La Sal National Forest is the only one that can restrict any type of use of this road pursuant to 36 CFR 212.7.

7. Will the designation of this road (as a Forest Development Road) change after reclamation of the Crandall Canyon Mine?

No. As noted above, the Crandall Canyon Road has historically been a Forest Development Road and will continue to provide public access in the foreseeable future.

8. Will the physical character of this road change after cessation of mining?

Yes. The road template will be modified to meet traffic types/volume forecast after mining.

9. Who will be responsible for making the changes and what entity will ensure the adequacy of the post mining changes?

The Manti-La Sal National Forest has the ultimate authority and responsibility for road maintenance and reclamation. Arrangements have been made with Genwal Coal Company to conduct these activities under terms of the Road Use Permit and they are bonded to that effect. The Forest Service regularly conducts inspections to ensure compliance with permit terms and will ensure the adequacy of post mining changes.

Don't hesitate to contact this office in the case that further questions arise regarding the Crandall Canyon Road.

Sincerely,

/s/Aaron Howe

for
GEORGE A. MORRIS
Forest Supervisor

cc: D-3 ✓

W. Nowak:cm



Norman H. Bangerter
Governor
Dee C. Hansen
Executive Director
Dianne R. Nelson, Ph.D.
Division Director

State of Utah

DEPARTMENT OF NATURAL RESOURCES
DIVISION OF OIL, GAS AND MINING

355 West North Temple
3 Triad Center, Suite 350
Salt Lake City, Utah 84180-1203
801-538-5340

EXHIBIT "G"

Yowell

Vicki

*Please file with appropriate
FDN's in notebook*

April 29, 1991

W. Hord Tipton
Deputy Director
Office of Surface Mining
Department of the Interior
1951 Constitution Avenue NW
Washington D.C. 20240

Dear Mr. Tipton:

Re: Appeals of Ten-Day Notice Responses
TDN 91-02-246-2 TV2, Crandall Canyon Mine
TDN 91-02-116-3 TVI, Cottonwood/Wilberg Mine
TDN 91-02-246-1 TVI, Deer Creek Mine

The purpose of this letter is to appeal the inappropriate responses by OSM-Albuquerque to the above-referenced TDNs which have been issued to the Division. The initial Division response to the TDNs and AFO's responses to the Division are attached. Also attached is OSM's April 18, 1991 letter regarding roads.

The Division hereby requests that you vacate the TDNs and forego any further TDNs regarding permitting of roads until the state and OSM have completed their review and approval decisions concerning rulemaking/program amendments. The justification for this recommendation is presented in the initial responses from the Division (attached) and the following reaction to the AFO's responses.

1. The AFO's misinterpretation of the status of the record on haul roads in Utah is disingenuous at best and borders on dishonest.
2. AFO assumes that the Division has already made decisions regarding roads. This is simply not true. The purpose of the state rulemaking is to provide authority and information for such reviews.
3. AFO was informed by the Division in March that the draft roads policy which it reviewed in its March 5, 1991 letter was not the same policy which was referenced in the state's rulemaking. AFO had been sent a copy of the final policy and proposed rule. Bob Hagen informed me that he was aware of the distinction


Page 2
Hord Tipton
April 29, 1991

between the draft and final policies and that any comments on the final policy would be reserved for the program amendment review. However, AFO continues to reference the draft policy and its March 5, 1991 letter rather than the final policy. There are important differences.

4. The Division has not categorically excluded public roads from permitting.
5. The Board's emergency rule puts the state in compliance with its own rules and statutes and allows the Division to make the requests for information which are necessary to evaluate the roads in question.
6. The Division can take no other action in response to the TDNs until the rulemaking/program amendment process is complete. Furthermore, OSM has received comment from more than one respondent to the program amendment, stating that any road permitting actions taken by the Division during the term of the emergency rulemaking should be overturned. This should extend to TDN responses.

Thank you for your consideration of these concerns.

Best regards,


Dianne R. Nielson
Director

lsj

cc: R. Hagen
T. Mitchell
L. Braxton
R. Daniels

DN37

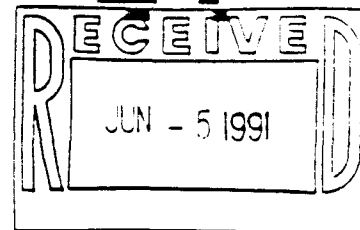


OFFICE OF SURFACE MINING
Reclamation and Enforcement
WASHINGTON, D.C. 20240

COPY

MAY 31 1991

EXHIBIT "H"



Dianne R. Nielson, Ph.D.
Director, Division of Oil, Gas,
and Mining
3 Triad Center, Suite 350
355 West North Temple
Salt Lake City, Utah 84180

Dear Dr. Nielson:

This is in response to your April 29, 1991, request for informal review of the Albuquerque Field Office (AFO) Director's determination that your agency has not taken appropriate action or shown good cause for not taking appropriate action with respect to both parts of ten-day notice (TDN) number 91-02-246-002 (Genwal Coal Company's Crandall Canyon Mine). The first part of the TDN alleges that the permittee failed to first obtain a permit from your agency prior to engaging in and carrying out any coal mining and reclamation operations, in accordance with Utah regulations at R614-300-112.400. The surface coal mining and reclamation operation in question pertain to a haul and access road. The second part of the TDN alleges that the permittee failed to prevent, to the extent possible, additional contributions of sediment to streamflow resulting from use of the haul road, violating R614-301-742.111.

In your request for review, you ask that I vacate the TDN because your agency can take no further action in response to the TDN until your pending program amendment concerning new definitions of "road" and "public road" is finalized by the Office of Surface Mining Reclamation and Enforcement. You maintain that approval of this proposed amendment is necessary before your agency can request information needed to evaluate the roads in question. Finally, you contend that issuance of the TDN so soon after promulgation of emergency rulemaking and submission of the program amendment denies your agency reasonable time in which to manage and enforce its program.

Notwithstanding your proposed program amendment, I cannot vacate the TDN since I am charged by regulation to dispose of each TDN appeal before me by affirming, reversing, or modifying the written determination of the Field Office Director based on the

facts surrounding the alleged violation(s). Moreover, I cannot agree with your argument that your agency is without authority under the approved Utah program to make a determination whether the road in question needs to be permitted.

The determination of whether a particular road associated with a mining operation is required to be permitted must be made on a case-by-case basis by the regulatory authority relying on the plain language of the State program counterpart to the definition of "surface coal mining operations" under section 701(28)(B) of the Surface Mining Control and Reclamation Act (SMCRA). The Utah counterpart at 40-10-3.(18)(b) is identical to the definition in section 701(28)(B) of SMCRA. Both definitions specifically state that surface coal mining operations include "all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage...."

In applying the Utah definition to the instant case, I considered all available facts in the record such as the purpose of construction, who constructed the roads, the relationship of the roads to the existing public road system, the current use of the roads, and the reconstruction, improvement, and maintenance of the roads. In the case of the Crandall Canyon Road (Forest Service Road No. 50248), the record shows that the road begins at State Highway 31, crosses the Huntington Creek, and dead ends at the mine site, approximately 1.5 miles in length. The road was originally a 15-20 foot wide Forest Service jeep trail, leased under a special use permit to Genwal in which the company was required to perform all maintenance. The road was reconstructed in 1981 by Genwal, widening it to 35-50 feet and providing an 8 inch gravel base. The bridge across the creek was also reconstructed by Genwal at their expense, expanding it to two lanes, 60 feet wide. These improvements were made by the company to facilitate coal haulage, and is used almost exclusively for access and coal haulage by the coal company.

Based on the foregoing facts, and in the absence of any specific information provided by your agency which would demonstrate that the Crandall Canyon Road does not fall within the definition of "surface coal mining operations," I find that the road is within the jurisdictional reach of the Utah program. Similarly, you have provided no information to refute the observations in the record that additional contributions of sediment have occurred through use of the road. Accordingly, I hereby affirm the determination of the Albuquerque Field Office Director with

regard to both violations, and hereby order a Federal inspection. That inspection will address the need to revise the permit to include the road referenced in the ten-day notice and also address the performance standard violation.

Sincerely,

W. Hord Tipton

W. Hord Tipton
Deputy Director
Operations and Technical Services

cc: Genwal Coal Company
P.O. Box 1201
Huntington, Utah 84527

Robert H. Hagen
Director, Albuquerque Field Office

Nina Rose Hatfield
Assistant Deputy Director
Operations and Technical Services

Carl C. Close
Assistant Director, Eastern Support Center

Raymond Lowrie
Assistant Director, Western Support Center

Joel Yudson
Assistant Solicitor, Regulatory Programs

United States
Department of
Agriculture

Forest
Service

Manti-LaSal
National Forest

599 West Price River Dr.
Price, Utah 84501

Genwal mine p-6

cc: L98
DAN
Rm A
Tom Mitchell

EXHIBIT "I"

Reply to: 2820

Date: June 7, 1991

Mr. Lowell Braxton, Associate Director
Division of Oil, Gas, and Mining
Utah Department of Natural Resources
355 West North Temple
3 Triad Center, Suite 350
Salt Lake City, Utah 84180-1203

Dear Lowell:

We have reviewed the May 31, 1991, letter directed to the Division of Oil, Gas, and Mining from W. Hord Tipton, Deputy Director, Reclamation and Enforcement, Office of Surface Mining, in which a Federal inspection has been ordered at Genwal Coal Company's Crandall Canyon Mine.

Regrettably, many of the facts used to support the jurisdictional determination are not correct and warrant clarification:

- I. The Crandall Canyon road, Forest Development Road (FDR) 50248, continues past the mine site and terminates at a trail head/parking facility which provides the public with access to unroaded National Forest System lands.
- II. Genwal Coal Company's use of the Crandall Canyon Road is permitted under a Forest Service Road Use Permit which authorizes non-exclusive commercial use of FDR 50248. The permit requires Genwal to perform road maintenance commensurate with their use.
- III. The Road Use Permit includes requirements to reconstruct FDR 50248 to accommodate projected traffic types/volumes including pavement (to be placed this summer), reclamation requirements which include reducing FDR 50248 width of travelway, and bonding requirements to ensure performance of permit requirements. It should be noted that the road and bridge were reconstructed to a double lane (24' travelway) width and is scheduled to be narrowed to a single lane (14' travelway) upon conclusion of mining activity.

The Crandall Canyon road is a Forest Development Road that has historically provided access for management and use of National Forest System lands. The road is managed by and under jurisdictional control of the Forest Service consistent with 36 CFR 212. The Forest Service reserves it's authority to manage/control Forest Development Roads as provided by statute and will not consent to their being incorporated into the mine permit area.

RECEIVED

JUN 10 1991

DIVISION OF

MINING & OIL GAS

TEL: 801-359-3940

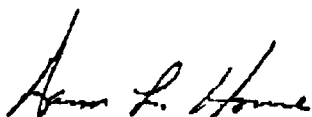
JUN 11 1991 15:56 NO.022 P.02

Additionally, our records indicate this jurisdictional issue was addressed at the time the Crandall Canyon mine was initially approved. Enclosed is a copy of correspondence received from the Office of Surface Mining, Reclamation and Enforcement, dated June 26, 1981, stating their office has no jurisdiction over Forest Development Roads. It is also noted that the original Crandall Canyon Mine Permit issued by the Office of Surface Mining on November 24, 1982, determined that the Road Use Permit/Forest Service jurisdiction is consistent with the Surface Mining Control and Reclamation Act.

We feel the issuance of the Ten Day Notice was inappropriate in that it was outside the authority of the Office of Surface Mining's inspector as the Crandall Canyon road is under the jurisdiction of the Forest Service. Whenever items needing correction are found by mine inspectors, our office should be notified so corrective action can be initiated. It would be beneficial if the federal inspectors would contact us when an inspection is planned so our minerals personnel could participate in oversight inspections.

If you have any questions, give us a call at the Supervisor's Office in Price, Utah.

Sincerely,

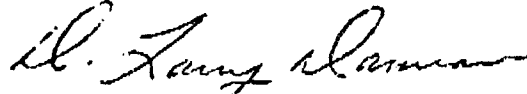


for
GEORGE A. MORRIS
Forest Supervisor

Enclosure

proposed mining operations further up Crandall Canyon. These proposals are presently being reviewed. The area addressed in your letter of June 8, 1981, is not addressed as part of the submitted mining and reclamation plans.

Sincerely,



D. Larry Damrau
Reclamation Specialist

Enclosures

cc: Robert Yuhnke
✓ William Boley, U.S.F.S.
Jim Smith, OGM

EXHIBIT "K"

Reply to: 2820

Date: June 10, 1991

Mr. Robert H. Hagen, Director
Albuquerque Field Office
Office of Surface Mining
625 Silver Avenue, SW, Suite 310
Albuquerque, New Mexico 87102

Dear Mr. Hagen:

Enclosed find a copy of our June 7, 1991 letter to the Utah Division of Oil, Gas, and Mining relating to the Crandall Canyon Road, Forest Development Road (FDR) #50248.

As noted in the above mentioned letter, FDR #50248 is managed by and under the jurisdictional control of the Forest Service, Manti-La Sal National Forest. This issue was specifically addressed by Reclamation and Enforcement in 1981. Your agency also certified that the Road Use Permit/Forest Service jurisdiction was consistent with the Surface Mining Control and Reclamation Act (SMCRA) in 1982 when the Crandall Canyon mine permit was issued. The only thing that has changed in the 10 years appears to be the interpretation of SMCRA regulations by your office.

It should also be noted that SMCRA includes a provision (702.b) stating that the permitting of mining operations is not intended to conflict with the authority and responsibilities of the Land Management Agency. Additionally, 36CFR701.5, in the definition of Permit Area, provides for the exclusion of facilities bonded by other agencies from SMCRA permitting requirements. There appears to be adequate provision within SMCRA and OSM regulations to acknowledge Forest Service jurisdiction of FDR #50248 as it has been permitted and bonded by the Manti-La Sal National Forest consistent with 36CFR212/261.

We reserve our authority to manage/control Forest development roads to ensure access for management and use of National Forest resources. Wherever there is a need for use by the public or other commercial activities there is potential for additional improvements and/or shared maintenance activities. Our objective in retaining jurisdiction is to accommodate these non-mining uses and our ability to assign development/maintenance costs based on traffic requirements.

We request you withdraw the notice(s) issued by your inspector relative to Forest Development Road #50248 due to lack of jurisdiction. Initial contacts to discuss this matter with Steve Rathbun of your office in April were not productive. We also note the record, as contained in Mr. W. Hord Tipton's letter to the Utah Division of Oil, Gas, and Mining, is not accurate. We would prefer this matter be resolved administratively without putting Genwal Coal Company, Inc., in the middle of a jurisdictional dispute.

20751 11751 NO.000 P.00

To facilitate resolution, we have requested our Chief's Office to discuss this issue with your National Office. If you have any questions please call Aaron L. Howe, Branch Chief Engineering and Minerals, at (801)637-2817.

/s/Aaron L. Howe
for
George A. Morris
Forest Supervisor

cc:
A.Howe

AHowe:gl



Norman H. Bangerter
Governor

Dee C. Hansen
Executive Director

Dianne R. Nielson, Ph.D.
Division Director

State of Utah

DEPARTMENT OF NATURAL RESOURCES
DIVISION OF OIL, GAS AND MINING

355 West North Temple
3 Triad Center, Suite 350
Salt Lake City, Utah 84180-1203
801-538-5040

EXHIBIT "L"

June 19, 1991

Harry Snyder, Director
Office of Surface Mining
1951 Constitution Avenue, N.W.
Washington, D.C. 20240

Dear Mr. Snyder:

The purpose of this letter is to formally record with the Office of Surface Mining (OSM) the state protest of the Hord Tipton denial of Utah's informal appeals requesting vacation of TDN 91-02-246-002 (Genwal Mine), TDN 91-02-116-003 (Cottonwood/Wilberg Mine), and TDN 91-02-246-001 (Deer Creek Mine). These TDNs were issued by the Albuquerque Field Office for failure to permit roads. The information concerning these TDNs and their informal appeals should be available in the Washington Office. However, should it not be available, please notify me, and I will immediately see that copies of the necessary information are supplied.

This protest of the issuance of the TDNs and Hord Tipton's reaffirmation is based on the following facts:

1. The Tipton response criticized the Division for failing to provide any additional information regarding the subject roads. However, the Division's appeals in all three cases were based on the fact that OSM was preempting the state's enforcement of its regulatory program. Therefore, the state's appeals were not directed to specific data concerning the individual roads.
2. The data which was provided by OSM in Hord Tipton's responses to the appeals and which formed the basis for his denial of the appeals, are incomplete and inaccurate.
3. The Tipton response implies that permit decisions were never made on the subject roads. In fact, all three mines are federal mines, and OSM issued a permit separate and distinct

from that issued by Utah for each mine. In each case, at the time of initial permit issuance and renewal, OSM either determined or concurred with the Division determination that each road is a public road not subject to permitting. Since that time, OSM has failed to define changes in its regulations or the state program which would support issuance of a notice of violation in contradiction to the original findings.

4. The state has continued to attempt to establish rules revisions and criteria which would form a basis for review of the initial permit determinations for these and other public roads. This process has been preempted by OSM's TDNs.
5. The criteria which the Tipton review cites for roads determinations have not been legally available for reviewing previous public roads permit decisions due to delays by OSM in approval of program amendments.

Utah's program includes definitions of "affected area", "roads", and "public roads." The definitions are nested such that "affected area" includes the term "roads," and "roads" includes the term "public roads." The criteria set forth in the Tipton response are included in the definition of "public road." However, OSM has failed to approve or disapprove the state's definition of "roads", although the program amendment has been before OSM since last fall. Absent a definition of "road", there is no operational connection between the definitions of "affected area" and "public roads." Therefore, the state has had no way to legally use "public roads" criteria to reevaluate the permit status of public roads.
6. The issuance of TDNs has heightened the conflict while preempting the state's authority to conduct case-by-case reviews of prior permit decisions which were originally made by or endorsed by OSM. A vacation of these TDNs will not preclude OSM's review of the Division's roads determinations during oversight.

Page 3
Mr. Harry Snyder
June 19, 1991

Preemption of the state's enforcement of its regulatory program is an important issue, one which is fundamental to the concept of state primacy. Thank you for your consideration of this protest by the State of Utah.

Best regards,



Dianne R. Nielson
Director

kak
cc: H. Tipton
R. Hagen
T. Mitchell
L. Braxton
Nevada Electric Investment Company
PacifiCorp

DN91

EXHIBIT "M"

Manti-LaSal National Forest
599 West Price River Drive
Price, Utah 84501

2820

May 20, 1981

Mr. Ron Daniels, Coordinator
State of Utah
Natural Resources Department
Oil, Gas, and Mining Division
1588 West North Temple
Salt Lake City, Utah 84116

Dear Mr. Daniels:

In answer to your request of 5/15/81, this memo will serve to clarify the status of the Crandall Canyon Road #50248, which accesses the proposed Genwal Coal Mine. Your question was whether or not the Crandall Canyon Road was a public road.

The Forest Service designation of the road in Crandall Canyon is as a Forest Development Road and one that appears on our Forest Transportation System. It is not a public road. A Forest Development Road is a Forest road under the jurisdiction of the Forest Service under the authority granted by 23 USC 101(a) (as amended by the "Surface Transportation Act of 1978") and PSN 7709.16 05--8 60; and 36 CFR 212.1(d) (FSM 1023.4--16); 36 CFR 261.2(e) (FSM 1023.4-110); FSM 7705.21; and FSM 6513.22b-1. A Forest Development Road is one to which the Forest Service has ownership; that is, the road is on National Forest lands or a formal easement has been granted to the Forest Service. The public may use a Forest Development Road. However, this privilege may be revoked at any time. Management of the Forest Development System remains with the Forest Service for all areas of administration, maintenance, construction, reconstruction, closure, and removal.

To differentiate, a public road is a road which was constructed prior to the reservation of the National Forest (on National Forest lands) for which the public right-of-way has been accepted by a public road agency (43 USC 932). In the absence of a public road agency, the Forest Service may—and often does—assume jurisdiction to exercise management and maintenance activities on the road. Thus, a public road may also be designated a Forest Development Road; however, authorities are limited.

A private road is one across private lands upon which a public right (43 USC 932) does not exist, or for which a right-of-way across National Forest lands has been granted to a private party, or for which a Class D special use permit has been issued.

2
There are, of course, many variations and contingencies that govern the administration of these roads as designated. An in-depth review is often necessary before one can be certain of the Forest Service responsibility or authority.

You may also be interested in knowing that the leasing or mining of minerals or other commodities does not change the status of roads, as they have been established other than may be prescribed by the Forest Service. In some instances, the Forest Service has given rights-of-way to public road agencies when the traffic becomes predominantly commercial or when highways are constructed and ROW's are requested by a public road agency.

Sincerely,

W. H. Boley

for
REED C. CHRISTENSEN
Forest Supervisor

WHDoley:ps

CC: D-3

U.S. DEPARTMENT OF THE INTERIOR
Office of Surface Mining Reclamation and Enforcement
MODIFICATION OF NOTICE OF VIOLATION OR CESSATION ORDER

1. Name Genval Coal Company		<input checked="" type="checkbox"/> Permittee <input type="checkbox"/> No Permit		Originating Office Address	
2. Mailing Address P.O. Box 1201, Huntington, UT 84527		USDI-OSM Albuquerque Field Office 625 Silver Ave., SW Suite 310 Albuquerque, NM 87102 Telephone Number (505) 766-1486			
3. Name of Mine Crandall Canyon		<input type="checkbox"/> Surface <input checked="" type="checkbox"/> Underground		Other (Specify) 7	
4. Telephone Number (801) 687-9813	5. County Emery	State Utah		8. Date of Inspection mailed from 06/26/91 Alb. on 6/28/91	
6. Operator's Name Same as above		9. Time of Inspection From _____ a.m. To _____ a.m.			
7. Mailing Address					
10. State Permit Number ACT/015/032	11. NPDES Number	12. MSHA ID Number 42-01715		13. OSM Mine Number N/A	
ACTIONS TAKEN					
Authority: Under the authority of the Surface Mining Control and Reclamation Act of 1977 (P.L. 95-87; 30 U.S.C. 1201) the following action is taken:					
14. Notice of Violation Number 91 - 02 - 244 - 3		Dated 6/26/91		15. Cessation Order Number - - - Dated	
16. VIOLATION <u>1</u> OF <u>1</u> IS MODIFIED: (Describe Action and Justify) CORRECTIVE ACTION REQUIRED (4) cease the further construction or improvement of the access/haul road until permitted in accordance with the approved State program; except those road widening and paving activities required, and approved by the U.S. Forest Service. Justification: To abate the USFS & OSM concerns for public safety and environmental harm resulting from additional contributions of sediment entering Crandall and Huntington Creeks.					
17. VIOLATION _____ OF _____ IS MODIFIED: (Describe Action and Justify)					
18. VIOLATION _____ OF _____ IS MODIFIED: (Describe Action and Justify)					
19. Print Name of Authorized Representative Gary Fritz				Identification Number 244	
20. Signature of Authorized Representative <i>Gary Fritz</i>				Effective Date June 28, 1991	